STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 19, 2013
v	No. 310146 Wayne Circuit Court
LEE ALLEN MASZATICS, Defendant-Appellant.	LC No. 12-000454-FH

Before: METER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Defendant appeals his bench trial conviction of domestic violence, third offense under MCL 750.81(4). For the reasons stated below, we affirm.

I. FACTS AND DEFENDANT'S CLAIMS

The Wyandotte police arrested defendant because of a possible domestic violence incident that involved his female roommate.[1] After a bench trial, where defendant testified on his own behalf, the Wayne Circuit Court found defendant guilty of third offense domestic violence. On appeal, defendant asserts that the trial court: (1) wrongly admitted evidence of his prior acts of domestic violence; (2) possessed insufficient evidence to support a conviction of domestic violence; and (3) improperly scored the variables in the sentencing guidelines. He also claims ineffective assistance of counsel. We address each issue in turn.

II. ANALYSIS

A. EVIDENCE OF PRIOR ACTS OF DOMESTIC VIOLENCE[2]

[1] Defendant and complainant had dated, but were no longer involved in a romantic relationship when defendant was arrested.

[2] A trial court's decision whether to admit or exclude evidence is reviewed for an abuse of discretion. *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012).

MCL 768.27b states that evidence of other acts of domestic violence committed by defendant within the previous ten years "is admissible *for any purpose for which it is relevant*, if it is not otherwise excluded under Michigan Rule of Evidence 403" (emphasis added). MRE 403 excludes relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Here, defendant's history with complainant—particularly, any history of domestic violence against complainant—is relevant, as it tends to shed light on the likelihood that defendant committed the crime of domestic violence in this specific instance. *People v Cameron*, 291 Mich App 599, 610; 806 NW2d 371 (2011). And, because defendant had a bench trial, the dangers of unfair prejudice contemplated by MRE 403 are not present. *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988) ("[a] judge, unlike a juror, possesses an understanding of the law which allows him to ignore [potential] errors and to decide a case based solely on the evidence properly admitted at trial"). Absent evidence to the contrary, which is absent here, the trial court is presumed to have decided defendant's case based solely on the evidence properly before it. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992).

Accordingly, the trial court did not abuse its discretion when it admitted evidence of defendant's prior acts of domestic violence.

B. SUFFICIENCY OF THE EVIDENCE[3]

Domestic violence, third offense, is defined in MCL 750.81(4):

> An individual who commits an assault or an assault and battery in violation of [MCL 750.81(2)], and who has 2 or more previous convictions for assaulting or assaulting and battering his or her spouse or former spouse, an individual with whom he or she has or has had a dating relationship, an individual with whom he or she has had a child in common, or a resident or former resident of his or her household, under any of the following, is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $5,000.00, or both:
>
> (a) This section or an ordinance of a political subdivision of this state substantially corresponding to this section.
>
> (b) [MCL 750.81a, 750.82, 750.83, 750.84, or 750.86].

[3] A challenge to the sufficiency of the evidence is reviewed de novo on appeal. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). "The evidence in a bench trial is sufficient if, when viewed in the light most favorable to the prosecutor, a rational factfinder could determine that each element of the crime had been proved beyond a reasonable doubt." *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

> (c) A law of another state or an ordinance of a political subdivision of another state substantially corresponding to this section or [MCL 750.81a, 750.82, 750.83, 750.84, or 750.86].

"An assault may be established by showing either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). "A battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person." *People v Reeves*, 458 Mich 236, 240 n 4; 580 NW2d 433 (1998).

Defendant has two prior convictions for domestic violence. At trial, complainant testified that defendant struck her on previous occasions when he was intoxicated and that she was afraid of defendant. She further testified that, on the night in question, defendant entered the apartment intoxicated, demanded complainant's phone, and punched her twice in the face when she refused to give it to him. Defendant's challenge to the credibility of complainant's testimony presents a question for the trier of fact that is beyond the province of this Court. When viewed in the light most favorable to the prosecutor, the evidence was sufficiently established that each element of the crime of domestic assault had been proved beyond a reasonable doubt.

C. EFFECTIVE ASSISTANCE OF COUNSEL

Whether a defendant was denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews findings of fact for clear error and questions of law de novo. *Id*. Under the *Strickland*[4] test used to analyze such claims, "counsel is presumed effective, and the defendant has the burden to show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). See also *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012) (holding that effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise).

Defendant claims that his trial attorney failed to adequately question complainant and the responding police officer, and did not properly prepare defendant for his testimony or rehabilitate him after cross-examination. But defendant does not identify any specific mistakes made by counsel—i.e., he does not suggest what counsel should have done differently, or suggest questions counsel should have asked the witnesses—nor does defendant demonstrate that the outcome of the trial would have been different but for counsel's alleged errors. Accordingly, his broad criticisms of his counsel's performance, unsupported by any citation to the record, are

[4] *Strickland v Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984).

insufficient to overcome the strong presumption that his counsel performed adequately, and that counsel's decisions were a matter of sound trial strategy.[5]

D. SENTENCING[6]

Our court previously remanded this case to the trial court so that defendant could move for correction of the guidelines scoring and/or resentencing.[7] On remand, the trial court corrected an error in the presentence investigation report as well as several errors in the sentencing guidelines scoring. When it changed its assessment on Prior Record Variable (PRV) 5 from twenty points to ten points, the trial court provided the relief sought by defendant with respect to PRV 5.

Defendant also challenges the trial court's scoring of Offense Variables (OVs) 3, 4, and 10. OV 3 is physical injury to a victim. MCL 777.33(1). MCL 777.33 requires assignment of ten points under OV 3 where "[b]odily injury requiring medical treatment occurred to a victim," and five points where "[b]odily injury not requiring medical treatment occurred to a victim." MCL 777.33(1). In *People v Uphaus*, 278 Mich App 174, 184–185; 748 NW2d 899 (2008), this Court stated:

> The rules of evidence do not apply to a sentencing proceeding, see MRE 1101(b)(3), "and due process does not require otherwise. . . ." Thus, when considering a defendant's sentence, a trial court may properly rely on information that would otherwise not be admissible under the rules of evidence [internal citations omitted].

The trial court relied on information from complainant's testimony at trial and information contained in the Presentence Investigation Report when it scored five points under OV3. *Uphaus* permits the trial court to consider the Presentence Investigation Report in its assessment of defendant's score. And both complainant's trial testimony and the Presentence Investigation Report indicate defendant injured complainant, and that complainant did not seek medical treatment after defendant injured her.[8] Accordingly, the trial court properly assessed defendant five points on OV3 based on the information contained in the presentence report.

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[5] Defendant also argues that he received ineffective assistance because trial counsel did not adequately object to the introduction of prior acts evidence. However, we have found that the trial court did not abuse its discretion in admitting this evidence.

[6] This Court reviews a trial court's scoring of the sentencing guidelines to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

[7] Order of the Court of Appeals, Docket No 310146, January 16, 2013.

[8] At trial, complainant testified that defendant punched her twice in the head, that there was not "yet" any visible bruising by the time police arrived the night of the incident, and that she did not seek medical treatment after the incident. The Presentence Investigation Report states:

Offense Variable 4 concerns psychological injury to a victim. MCL 777.34(1). MCL 777.34 provides that ten points shall be assessed on OV 4 where "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.33(1)(a). The statute further emphasizes that, where "the serious psychological injury *may* require professional treatment," ten points should also be assigned, and "the fact that treatment has not been sought is not conclusive." MCL 777.34(2) (emphasis added). A "victim's expression of fearfulness is enough to satisfy the statute" and justify the assignment of ten points. *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009).

At trial, complainant testified that she was afraid of defendant and hid from him on several occasions. At the sentencing hearing, complainant stated:

> I feel that if you let Lee go, he's gonna [sic] put me and a lot of other women in danger. He likes to beat on women. I can't sleep. I'm afraid to go out my door. And I know when he does get out of here, he's gonna [sic] come look for me. I can't hide anymore in empty apartments and hide in my basement till he sobers up. And I just, I don't know.

There is no evidence that complainant sought professional treatment for psychological injuries. However, the quoted statement from the sentencing hearing is an expression of her fear of defendant and is sufficient to show, by a preponderance of the evidence, that, as a result of the assault, complainant suffered a serious psychological injury that may require professional treatment. See *People v Wiggins*, 289 Mich App 126, 128; 795 NW2d 232 (2010). Therefore, the trial court's assessment of ten points on OV 4 fell within its sound discretion.

Offense Variable 10 concerns the defendant's exploitation of a vulnerable victim. MCL 777.40 provides, in relevant part:

> (1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or *a domestic relationship*, or the offender abused his or her authority status……..10 points
>
> * * *
>
> (2) The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.

"Complainant indicated that the last assault resulted in her eardrum being punctured. She also stated that defendant kicked her so hard that her leg was numb for approximately one month." The "last assault" referenced in the report is the assault at issue.

(3) As used in this section:

* * *

(b) "Exploit" means to manipulate a victim for selfish or unethical purposes.

(c) "Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation. [Emphasis added.]

Under the clear language of MCL 777.40, ten points will be assessed under OV 10 if the offender exploited a domestic relationship to manipulate a victim for selfish or unethical reasons.

Here, complainant testified that she only allowed defendant access to her apartment one day to use the shower, and that defendant simply "never left" and "changed his address" to her apartment address. Complainant's statements at trial were sufficient to support a finding that defendant exploited the previous domestic relationship between himself and complainant to gain entry to the apartment, and that it was only through his manipulation of complainant that defendant was in the apartment on the night of the incident. Therefore, the decision to assess ten points on OV 4 was within the sound discretion of the trial court.

Because the original sentence falls within the recalculated sentencing guideline range of two to 25 months, the trial court did not abuse its discretion by denying defendant's motion for resentencing and allowing the original sentence to stand.

III. CONCLUSION

For the reasons stated above, we reject defendant's arguments on appeal and affirm the ruling of the trial court.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Henry William Saad